# *Mediation as a Charming Dispute Resolution Mechanism*

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***Abstract***

Mediation can be adapted various types of disputes with respect to labour, commercial and family. Like negotiation, minitrial and conciliation mediation is an attractive option for the disputants who prefer to maintain an amicable working relationship. Non-adversarial characteristic of mediation, together with other beneficial features, led to the broader use of mediation in order to settle commercial and/or non-commercial disputes among disputants. In principle, application of mediation is voluntarily; however, under some jurisdictions parties are obliged to participate in mediation so as to exhaust such method in first and afterwards shall apply other means of dispute resolution. Nevertheless, this article mainly focuses on the notion of mediation, characteristic of mediation, advantages and disadvantages, forms of mediation and mediation process.

***Keywords: Mediation and Alternative Dispute Resolution***

## 1. Historical Background and Definition of Mediation

There is no single, uniform, accepted definition of mediation. It is not that various people have not suggested definitions of mediation. Instead, this lack of uniformity stems from the reality that mediation can mean many different things in different context[1].

Mediation is a much more new process than arbitration or litigation and it has been used to resolve labour, commercial, community disputes and divorce cases. Mediation is a process of which can be adapted to many distinctive types of disputes. Although arbitration is probably the most common alternative dispute resolution ("ADR") mechanism used outside of the court room, due to the relatively recent proliferation of arbitration contract clauses, mediation is being used with increasing frequency. Commercial disputes often arise between parties, who, out of necessity, must be able to maintain an amicable working relationship.

[1] Michael L. Moffitt, Andrea Kupfer Schneider, Dispute Resolution: Examples and Explanations, Wolters Kluwer Law & Business, Second Edition, 2011, p.83

Mediation's non adversarial approach to dispute resolution is an attractive option[2]. The successful application of mediation in the aforesaid areas has led to the broader use of mediation in order to settle commercial and/or non-commercial disputes among conflicting parties.

However, under some jurisdictions, parties of a dispute are occasionally obliged to participate in mediation so as to exhaust such method in first place and afterwards may apply other types of methods in order to obtain a decision with regard to the dispute in question.

Mediation is a process in which a third party (usually neutral and unbiased) facilitates a negotiated consensual agreement among parties, without rendering a formal decision[3]. Furthermore, mediation is defined by Goldberg, Sander, and Rogers as "an assisted and facilitated negotiation carried out by a third party"[4].

Simply, mediation is an ADR method in which third party natural assists conflicting parties in order to reach a mutually dreamed agreement. Whether an agreement results or not, and whatever the content of that agreement, if any, the parties themselves determine rather than accepting something imposed by a third party[5].

## 2. Characteristics of Mediation

Mediation is defined as a private, voluntary negotiation process using a trained neutral third party to facilitate final, contractually binding settlement between parties involved in a dispute[6].

Mediation is a voluntary process. The parties agree to the process, the content is presented through the mediation, and the parties control the resolution of the dispute.

[2] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 90
[3] Carrie Menkel Meadow, Mediation, Arbitration and Alternative Dispute Resolution, Legal Studies Research Paper Series No. 2015-59, p.2
[4] Goldberg, Sander, and Rogers, Dispute Resolution: Negotiation, Mediation, and Other Processes, Second Edition, 1992
[5] Subhan Jelis, Arbitration Conciliation and Mediation- Conflict between Formal and Informal Setups, p.10
[6] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 93

Because the participation of the parties and the mediator is voluntary, the parties and/or the mediator have the freedom to leave the process at any time.

The mediator may decide to stop the process for ethical or other reasons, and the parties may decide that they are not satisfied with the process. The agreement, which is reached between the parties, is voluntary; the parties own it and are responsible for implementing it. The agreement is validated and ratified by the courts[7].

Mediation is not an adversarial proceeding. There is no "plaintiff" or "defendant" as with arbitration, and the mediator does not seek to determine "who is wrong" and "who is right.[8]"

## 3. Advantages and Disadvantages of Mediation

Mediation has a special advantage when the parties have ongoing relations that must continue after the dispute is managed, since the agreement is by consent and none of the parties should have reason to feel they are the losers[9]. Mediation provides an opportunity for conflicting parties to maintain their current relationship by resolving dispute by a win-win solution and accordingly establish strong long-term business relationship.

Apart from the advantage mentioned above, additional advantages of mediation are examined below in detail:

- **Flexibility.** Parties of a dispute are entitled to determine process of the mediation in accordance with interest and needs of each party. This may involve the choice over location of the mediation, the time frame, the people who are to be involved, the selection of acceptable objective criteria, and many other choices related to the process[10].

- **Less Costly.** Mediation is less costly when compared adjudicative ADR methods. Mediation can normally be completed in multiple conferences between conflicting

[7] Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, No.7, p.30
[8] Ivan Bernier, Nathalie Latulippe, Conciliation as a Dispute Resolution Method in the Cultural Sector, The International Convention on The Protection and Promotion of The Diversity of Cultural Expressions, p.4
[9] Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, No.7, p.30
[10] Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, No.7, p.30

parties. Furthermore, mediation is not a formal evidentiary process requiring extensive use of expert witnesses or demonstrative proof. As a result, the costs associated with the use of expert witnesses, trial counsel and case preparation are substantially reduced or even eliminated[11].

- **Efficiency**. Another charming feature of mediation is the speed of the proceedings of which parties can resolve their dispute faster than adjudicative methods. There are various reasons of this circumstance; first, mediators are present to manage negotiation, not to represent a party or render a legal decision, they need not prepare extensively to conduct the conference[12]. Second, the vast majority of countries face a spectacular problem of overcrowded court dockets which cause considerable delay in trials.

- **Range of Settlement Options.** Mediation process offers wide range of settlement options which is limited only by the imagination of the parties and the mediator. Although certain forms of injunctive relief are possible through litigation, most judges and juries think of the resolution of a civil case in dollar terms. Conversely, mediation allows parties to consider a far wider range of remedies. Long-term structured payment schedules and annuities allow parties to treat economic outcomes more creatively[13].

  In addition to that noneconomic remedies are also possible in mediation. Briefly, parties of dispute can craft outcomes which they deemed fits to their dispute and also significant to sustain important business relationships by avoiding the confrontation and acrimony associated with trial.

- **Informality.** Mediation allows the parties to present their arguments in an informal manner, not bound by the procedures of the legal system. Mediation is a form of guided dialogue, where the parties have the ability to express their feelings, not only facts, so that venting anger can help in reaching an agreed solution[14].

[11] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 94
[12] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 94
[13] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 94
[14] Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, No.7, p.30

- **Preserved to Apply Other Dispute Resolution Mechanisms.** As mentioned above, parties are, at any time, free to opt out mediation proceedings without any valid or justified reason. Besides mediation process shall not preclude parties' main right to apply more formal dispute resolution mechanism such as arbitration or litigation. Parties may therefore free to strive for a settlement without jeopardizing their chances for or in a trial if mediation is unsuccessful[15].

- **Confidentiality**. Litigation is usually open to public while all written and/or oral correspondences through the course of mediation are private. The confidentiality of mediation may encourage parties to speak more openly and allow the true reasons for the disputes to emerge more quickly[16]. Common law does not guarantee privacy or confidentiality in settlement discussions.

  However, it is not uncommon for state statutes to prohibit the introduction of evidence that the parties have tried (unsuccessfully) to reach a settlement. Many state statutes and ADR rules require that mediations and other ADR proceedings be kept confidential[17].

  Like other ADR methods, mediation also has its disadvantages. Most sensitive disadvantages of mediation are:

  - **Absence of Due Process Protection**. The formalized procedural and evidentiary rules of due process designed to protect parties and associated with the trial or arbitration of lawsuit are lacking in mediation[18].

  - **Absence of Appeal Process**. Parties of a dispute cannot apply to appeal process in the event that the privately negotiated agreement is later

[15] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 94
[16] Radford Mary F., Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters, 34 ABA REAL PRoP. PROB. & TR. J. 601, 2000, p.242.
[17] Radford Mary F., Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters, 34 ABA REAL PRoP. PROB. & TR. J. 601, 2000, p.242.
[18] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 95

determined by one of the parties to be flawed on some way. All mediation process and agreement is strictly confidential and accordingly it is never performed on the record or recorded by a clerk. Owing to that, unlike arbitration and litigation, mediation agreements are virtually impossible to appeal[19]. Consequently, parties of the mediation process are usually bound by the agreement reached mutually and in accordance with the interests and needs of conflicting parties.

It is possible to argue that an agreement was tainted by fraud, duress or some other legal defence to a contract, but this is much different from formally appealing a court's judgement or an arbitrator's decision[20].

- **Lack of Standardized Rules and Process**. Lack of standardized rules and process sometimes makes mediation inconsistent, haphazard, unpredictable and unreliable.

## 4. Forms of Mediation

From past to present scholars and researchers have developed distinctive forms of mediation in order to describe and compare approaches of mediation. The models of mediation described by those taxonomies demonstrate recurring patterns of mediation practice, many of which are often used in mediation literature as shorthand to describe different styles that combine key characteristics[21].

Forms of mediation are most commonly divided into three styles- facilitative, evaluative and transformative.

[19] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 95
[20] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 95
[21] Michael L. Moffitt, Schneider Andrea Kupfer, Dispute Resolution: Examples and Explanations, Wolters Kluwer Law & Business, Second Edition, 2011, p.84

- **Facilitative Mediation.** The mediator manages the process by which the parties negotiate their case[22]. The mediator's position in facilitative mediation is motivated by three considerations. First, facilitative mediators see the parties as being the best situated to determine which outcome(s) best meet their needs. Second, facilitative mediators see a neutral stance as more likely to endanger the parties' trust. Finally, facilitative mediators believe that their approach maximizes the effectiveness of the mediator's interventions because the mediator is not simultaneously focused on other things (like the law or the merits of various options)[23].

  In facilitative mediation the mediator rarely offers direct assessment of the merits of the cases, nor appraises the outcomes the parties suggest. Instead, he or she constructs a process that allows the parties to negotiate effectively, offering procedural assistance and nonbinding substantive input[24].

  Facilitative mediation is an umbrella term that encompasses a number of different variations[25]. One of these variations is termed as "understanding-based" mediation. Through application of understanding based mediation, mediator conducts private meetings with one of the disputants, without considering that such private meetings jeopardize his or her neutrality or impartiality.

- **Evaluative Mediation.** While facilitative mediations focus on exploring parties' interests and the possibility of creative settlement options, evaluative mediations focus primarily on the parties' alternatives to settlement[26].

[22] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 97
[23] Michael L Moffitt., Schneider Andrea Kupfer, Dispute Resolution: Examples and Explanations, Wolters Kluwer Law & Business, Second Edition, 2011, p.85
[24] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 97
[25] Michael L. Moffitt, Andrea Kupfer Schneider, Dispute Resolution: Examples and Explanations, Wolters Kluwer Law & Business, Second Edition, 2011, p.86
[26] Michael L. Moffitt, Andrea Kupfer Schneider, Dispute Resolution: Examples and Explanations, Wolters Kluwer Law & Business, Second Edition, 2011, p.86

Here, the role of the mediator provides few, if any, judgements on the case, the evaluative mediator is often an expert in the area of law or controversy confronting the parties and is called on to provide input from that perspective after hearing the case from both parties[27]. Briefly, in evaluative mediation, mediator use their own creativity, and come up with suggestions, ideas, and offers of their own and has a dominant role by explaining strengths and weaknesses of their cases and claims to the conflicting parties.

Mediator has direct influence over the outcome reached in negotiation process. However, mediators do not have any binding authority, evaluative mediators may use the authority conferred by their experience to propose solutions or compromises and direct the parties towards them.

- **Transformative Mediation.** Both facilitative and evaluative mediation have their focus the resolution of a particular dispute. Transformative mediation, by contrast, focuses on the disputants themselves and on their interactions, rather than on the specifics of a particular dispute (no matter how broadly defined)[28]. Transformative mediation approach based on two components, **empowerment and recognition**.

**Empowerment.** Transformative mediation empowers individuals in order to make them feel more confident and able them to listen, trust and respect to the other party for potentially build a more productive relationship and outcome. Thus, empowerment provides parties the ability to recognize and appreciate the values and perspectives of its counterparts.

**Recognition**. The parties have the ability to understand the other party's point of view, and why they proposed the solution that they did (without necessarily agreeing to it). A transformative mediation has an educational value for the parties. By gaining the ability

[27] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 97
[28] Michael L. Moffitt, Andrea Kupfer Schneider, Dispute Resolution: Examples and Explanations, Wolters Kluwer Law & Business, Second Edition, 2011, p.89

to reflect on the process, the parties may be able to use the same techniques in order to avoid future disagreements and disputes. The parties learn to use the opportunity of a conflict as an event from which both parties may benefit[29].

## 5. General Overview of Mediation Process

As mentioned above, there is no uniform definition of mediation. Owing to that it would not possible to illustrate mediation process unquestionably. Nowadays, lots of authors try to categorise phases of mediation and some of these descriptions are instructive and helpful because they provide a fundamental information as to the processes which will generally be followed by the conflicting parties.

Mediation usually commences upon a request of one party to solicit the participation of other parties to the dispute. Upon receiving the request of mediation, the prospective mediator shall declare that there is no conflict of interest between him or herself and parties of the dispute. Application of the conflict of interest restriction is quite a sensitive issue and therefore there are lots of open doors for abuse. If no conflict of interest exists, the mediator will contact all relevant parties in order to explain the mediation process and secure participation of the parties.

After receiving consent of relevant parties to proceed with mediation, the mediator will send ***agreement to mediate*** of which is a formal document and demonstrates the expectations of the parties and mediator when negotiation process begins. The agreement is normally in contractual form and contains, among other things, guarantees regarding the confidentiality of the process, the finality of any agreement reached, and the authority to settle[30]. The parties usually sign such agreement in the first mediation meeting.

The mediator will confirm that all parties participating agree to do so with full **authority to settle the case**. The mediation process compromises of several stages. Normally the mediation process initiates with a brief, to the point and informal mediator's opening

[29] Yona Shamir, Alternative Dispute Resolution Approaches and Their Application, No.7, p.28
[30] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 99

statement. Opening statement includes details as to the mediation process and roles of both parties and the mediator.

Following the mediator's opening statement, the party opening statements will be delivered to the mediator. Party opening statements involves a summary of the facts, issues and desired outcome.

Party opening statement affords an opportunity to mediator to examine parties' position in order to proceed in a productive manner. Subsequently, the mediation process will continue with facilitated negotiation. Through facilitated negotiation period, the mediator will attempt to facilitate incremental compromise from both parties toward settlement. This is accomplished most significantly by helping the parties to expand the sources by identifying assets not previously described by the parties, by redefining or reconfiguring certain assets, or by looking for noneconomic assets that may be of some value to the parties[31].

Mediator is entitled to conduct private meetings with each party together with the mediation meetings. These private meetings is termed as **caucus** and allow parties to address issues which are not appropriate to discuss or disclose in open sessions, such as strengths and weaknesses of particular aspects of the case. Caucus meetings are strictly confidential and thus parties of a dispute at stake are feeling significantly freer to disclose confidential information as to their case and claims.

Parties are entitled to walk away from mediation whenever they deem such process as insufficient. Nonetheless, if parties find common way to settle the dispute at stake, the mediator will assist parties with regard to the closure. At this stage, the mediator has two roles to play in the closure scene. First, the mediator will assist parties to reach a point of final, formal acceptance of the settlement. Furthermore, the mediator is under obligation to remind the parties of the finality of any agreement reached via mediation process. Second, the mediator will also assist the parties while crafting the agreement because most successful mediation meetings result with an agreement that is final, permanent and immediate.

[31] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 99

## 6. Basic Principles of Mediation

Basic principles of mediation are impartiality, self-determination and informed consent.

- **Impartiality.** Mediator should not have an interest in the substance or outcome of the dispute and also any relationship with the parties of the dispute at stake. Through the course of negotiation process, mediator should serve as a facilitator not as a supporter of any party. Owing to that mediator shall remain impartial and keep his or her distance between the parties of the dispute.

- **Self-Determination.** Self-determination, the idea that parties voluntarily determine the elements of an agreement, is hallmark of mediation in virtually all of the articulations of mediation's foundational principles[32].

- **Informed Consent.** The main distinction between mediation and adjudicative dispute resolution processes is affording an opportunity to parties of a dispute to render a mutually satisfactory decision and satisfactory decisions depend on the parties having adequate information.

## 7. How to Select Appropriate Mediator?

Unfortunately, there is no prerequisite to become a mediator. In order to transmit our dispute into the safe hands, it would be utmost importance to select a mediator who has significant knowledge and experience with regard to the dispute in question. Mediators usually have social science or strong business background. The most important factor to consider while determining the mediator, of course, is the training and experience of the mediator, as well as any related professional training. Another important aspect to consider is the scope of the mediator services. All mediators do not provide all types of mediation services.

For example, parties seeking conventional facilitative mediation should look for mediators trained in that type of mediation[33].

[32] Michael L. Moffitt, Andrea Kupfer Schneider, Dispute Resolution: Examples and Explanations, Wolters Kluwer Law & Business, Second Edition, 2011, p.93

## 8. Conclusion

In the light of aforesaid explanations, currently, mediation is deemed as an important dispute resolution mechanism for the vast majority of disputants due to its non-adversarial, flexible and efficient nature. However, there are still considerable discussions as to whether mediation should be mandatorily applied to all or some disputes prior to applying most desirable ADR method.

It may be suggested that obligatory mediation may be beneficial for some disputes with respect to family and simple commercial disputes because usage of such method shall decrease docket numbers in courts and also provide considerable efficiency (with respect to time and cost) to disputants. However, it is vital to bear in mind that unsuccessful mediation process may cause delay in process and waste of economic resources. Due to this ground, disputants shall outweigh the benefits and risks of applying mediation in first.

[33] Lucille M. Ponte, Thomas D. Cavenagh, Alternative Dispute Resolution in Business, West Educational Publishing Company, 1991, p. 107

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